Supreme Court, U.S.
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No. 94-106

In the Supreme Court of the United States

OCTOBER TERM, 1994

BECTON DICKINSON AND COMPANY, PETITIONER

v.

UNITED STATES, EX REL. DAVID R. SILLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States will address the following question:

Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3729 *et seq.*, preclude a district court from granting the government's out-of-time motion for additional time to determine whether it will intervene in litigation brought under the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 21 F.3d 1339. The opinion of the district court (Pet. App. 35a-40a) is reported at 813 F. Supp. 410.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1994. The petition for a writ of certiorari was filed on July 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the False Claims Act, 31 U.S.C. 3729 *et seq.*, Congress provided a cause of action against those who knowingly present false claims for payment to the

United States. 31 U.S.C. 3729. The Act is the government's primary litigative tool to recoup losses sustained as the result of fraud against the government. See S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (Senate Report). The statute requires the Attorney General to investigate violations of the Act diligently, and authorizes the Attorney General to bring suit for violations to recover treble damages and civil penalties. 31 U.S.C. 3729 and 3730(a). The Act also provides, in Section 3730(b), for "actions by private persons." The Act permits the private "relator" in these "*qui tam*" cases to recover a share of the proceeds of the action in the event that the suit is successful. 31 U.S.C. 3730(d).

As amended in 1986, the *qui tam* provisions of the Act permit a private litigant to commence an action on behalf of the United States by serving the Attorney General with "[a] copy of the complaint and written disclosure of substantially all material evidence and information" in the relator's possession and by filing the complaint in camera in a district court. 31 U.S.C. 3730(b)(2). The complaint remains under seal for an initial period of at least 60 days and may not be served on the defendant except by order of the court. *Ibid.*

The period during which the complaint remains under seal is intended to provide the government with an "adequate opportunity to fully evaluate the private enforcement suit" and to determine "whether it is in the Government's interest to intervene and take over the civil action." Senate Report at 24. The statute provides that the government "may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal." 31 U.S.C. 3730(b)(3). The Act permits the government to make its showing of "good cause" for an enlargement of the period upon affidavits or other submissions in camera. *Ibid.* The

length of any enlargement is left to the discretion of the court.

The statute further provides that

> Before the expiration of the 60-day period or any extensions obtained under [Section 3730(b)(3)], the Government shall—
>
> (A) proceed with the action, in which case the action shall be conducted by the Government; or
>
> (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

31 U.S.C. 3730(b)(4).

If the Attorney General elects to join a *qui tam* suit, the Department of Justice takes on primary responsibility for prosecuting the action and is not bound by any act of the relator. 31 U.S.C. 3730(c)(1). If the Attorney General declines to join the suit, the Act authorizes the relator to conduct the litigation on his own. 31 U.S.C. 3730(c)(3).

2. The United States Department of Veterans Affairs (VA) is charged with responsibility for negotiating and administering contracts to procure pharmaceutical and diagnostic products to supply VA hospitals and other federal government facilities. Petitioner manufactures and sells such products to the government under contracts with the VA. Pet. App. 39a. Respondent David Siller was an employee of Scientific Supply, Inc., a company that formerly distributed petitioner's products. *Id.* at 3a.

On December 27, 1990, Siller disclosed to the Office of the Inspector General for the VA evidence that he believed demonstrated that petitioner had overcharged

the government. Pet. App. 4a. In January, 1991, Siller filed a *qui tam* complaint and served the Attorney General. *Ibid.* Siller alleged that petitioner had violated the Act and defrauded the VA by certifying that it was selling diagnostic products to VA hospitals at prices at least as favorable as those available to its most favored commercial customers, when in fact petitioner knew that it was providing these products at substantially lower prices to commercial customers. *Id.* at 39a. The case remained under seal for 21 months while the VA and the United States Department of Justice actively investigated Siller's allegations. *Id.* at 4a. During that time the government moved for, and obtained, eight extensions of time in which to consider whether to intervene. *Ibid.*

3. On two occasions, the government filed a motion to extend the period for intervention after a previous court-ordered extension had lapsed. Pet. App. 4a. On the first occasion, United States District Judge Benson Legg had set a deadline of March 4, 1992, for the government to intervene or to move for a further extension of the time permitted to intervene. *Ibid.* Three weeks after the March 4 deadline, the Assistant United States Attorney assigned to the matter was notified by the court that no papers had been received. She then filed a motion for an order enlarging, *nunc pro tunc*, the time permitted for the United States to intervene. Judge Legg granted this motion on March 27, 1992. *Id.* at 5a. The Assistant United States Attorney subsequently filed an affidavit stating that she had caused a motion for a further extension to be placed in the night filing box in the clerk's office on March 4. *Id.* at 4a-5a.

On a second occasion, Judge Legg had entered an order maintaining the seal on the case until August 3, 1992. Pet. App. 5a. The United States did not file a motion to

extend the period for intervention until August 5. *Ibid.* Judge Legg nevertheless granted the motion, setting a deadline of October 5, 1992, for the government to make its election. *Ibid.* On October 5, the government filed a notice of election to intervene and notice of appearance. *Ibid.*

4. After the complaint was served, petitioner moved to dismiss the United States as a party to the action. Petitioner argued that the government's failure to notify the court of a decision to intervene, or to move the court for an extension of the time to intervene, before a previous extension of the period for intervention had lapsed, barred prosecution of the suit by the government. Pet. App. 5a. Petitioner also argued that Siller was barred from proceeding with the action on the ground that he had based his complaint on allegations or transactions that had been disclosed in civil suits filed against petitioner before Siller filed his *qui tam* complaint. See 31 U.S.C. 3730(e)(4)(A).

The action was transferred from Judge Legg to Judge Frederic N. Smalkin. Pet. App. 5a. Although Judge Legg had granted the requested extensions of time notwithstanding their untimely filing, Judge Smalkin dismissed the action for want of subject matter jurisdiction, concluding that Judge Legg had acted without authority in granting extension motions filed after previously granted extensions had expired.[1] *Id.* at 35a-38a, 40a. Judge Smalkin thus concluded that "the Government's window of opportunity to intervene * * * closed irrevocably" on the first occasion when a court-ordered extension lapsed without the filing of a notice or motion by the United States. *Id.* at 36a. The court also

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[1] The district court rejected the government's position that in fact the motions had been timely filed. Pet. App. 36a-38a.

dismissed the complaint filed by the relator, ruling that the suit had been based upon allegations publicly disclosed in prior civil hearings and that Siller was not the "original source" of the allegations. See *id.* at 38a-40a (citing 31 U.S.C. 3730(e)(4)).

5. Both the United States and Siller appealed. The court of appeals reversed the district court's judgment concerning the government's intervention in the suit and vacated that part of the district court's order dismissing Siller's *qui tam* complaint. Pet. App. 34a. With respect to the government's right to intervene and proceed with the case, the court concluded that the intervention period provided by operation of 31 U.S.C. 3730(b)(4) is not jurisdictional. Pet. App. 15a. The court of appeals found that the only textual evidence that Congress intended Section 3730(b)(4) to be jurisdictional is the statutory requirement that the government "shall" proceed with the action before the expiration of the 60-day period for intervention or any extensions of that period granted by the court. Pet. App. 10a. Relying on *Brock* v. *Pierce County*, 476 U.S. 253 (1986), the court of appeals held that "th[e] use of the word 'shall' is insufficient evidence of a congressional intention that section 3730(b)(4) serve as a jurisdictional requirement upon the government in *qui tam* actions." Pet. App. 15a. The court stated as well that it found "nothing in the [False Claims Act's] history or purpose suggesting that Congress did intend a jurisdictional requirement." *Ibid.* The court of appeals therefore held that "the government's failure to comply with section 3730(b)(4) does not bar its further prosecution of a *qui tam* action." Pet. App. 15a.

ARGUMENT

The decision of the court of appeals with respect to the government's intervention in this suit is fully consistent with this Court's decisions and does not conflict with decisions of any other court of appeals. Nor has petitioner demonstrated that the failure of the United States to file timely requests for extensions of the intervention period in False Claims Act *qui tam* cases is a substantial and recurring problem of such importance as to warrant exercise of this Court's certiorari jurisdiction.[2]

1. Petitioner argues (Pet. 17-18) that the court of appeals disregarded the requirements of 31 U.S.C. 3730(b)(4) and "dangerously extend[ed]" the limits established by the Court in *Pierce County* for determining when and in what manner statutory deadlines are enforceable against the government. Petitioner's argu-

[2] The first and second questions presented by the petition address the court of appeals' decision to vacate the district court's dismissal of respondent Siller's *qui tam* complaint. The United States did not address those issues in the court of appeals, and we express no view as to their proper resolution. We note, however, that if (as we urge) this Court denies certiorari with respect to the third question presented by the petition, the first and second questions will have limited significance in the instant case. Now that the United States has taken over the prosecution of the action, the suit against petitioner will go forward with or without the relator. We note as well that the decision as to whether respondent Siller is a proper relator is interlocutory: the court of appeals vacated the judgment that had been entered in petitioner's favor concerning Siller's participation, and remanded the case to the district court to determine whether Siller is a proper relator under its ruling. See Pet. App. 22a, 34a. The present case therefore appears to furnish an inappropriate vehicle for this Court's resolution of the first and second questions presented by the petition.

ment assumes that, unless the sanction for failure to comply with a deadline on Executive Branch action is the loss of all power to act, statutes prescribing such deadlines are meaningless. This Court has rejected that proposition, concluding instead that "[t]here is no presumption or general rule" that for every duty imposed upon the government, there must exist some punitive sanction for departures or omissions. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990). To the contrary, federal statutory provisions imposing procedural duties on federal officials must be construed in light of the "great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 718 (quoting *Pierce County*, 476 U.S. at 260, and *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). Accordingly, "if a statute does not specify a consequence for non-compliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 506 (1993). Cf. *Montalvo-Murillo*, 495 U.S. at 721 ("We do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce * * * the Government into complying with the statutory time limits.").

In *Pierce County*, the Court reaffirmed the long-standing principle that, where important public rights are at stake, a failure to observe a procedural requirement does not bar subsequent agency action unless it appears that Congress intended such a result. Thus, the statutory requirement that the government "shall" comply with a specified procedure does not compel the conclusion that the government's failure to do so results in a loss of the power to act. 476 U.S. at

260; accord *Montalvo-Murillo*, 495 U.S. at 718. Rather, the courts must look to other indicia of congressional intent before concluding that a statutory deadline is jurisdictional. *Pierce County*, 476 U.S. at 259-265.

The Fourth Circuit closely followed that approach in the instant case. The court of appeals found that here, as in *Pierce County*, use of the word "shall" provided insufficient textual evidence that Congress intended Section 3730(b)(4) to act as a jurisdictional provision. Pet. App. 15a. The statute does not specify any consequences for failure to meet the statutory deadlines. The court of appeals did not hold that the statutory intervention deadline is "meaningless" (Pet. 17), or that a district court "may not enforce the deadline" against the government. See Pet. 4. To the contrary, the court found that a district court confronted with a breach of the procedures described in Section 3730(b) may enter an order compelling the government to comply with the statutory deadline, or construe the government's failure to comply as an election under Section 3730(b)(4)(B) to decline to take over the action.[3] Pet. App. 11a. Those remedies are fully adequate to redress the injury, if any,

[3] The court of appeals expressly reaffirmed that district courts retain the discretion to decline to grant to the government enlargements of the time permitted for intervention requested under Section 3730(b)(3). See Pet. App. 15a n.7. The court also did not question the authority of the district courts to deny the government the right to proceed with an action because of repeated noncompliance with orders of the court. *Ibid.* In the instant case, however, the district court granted both of the disputed requests for enlargements of the intervention period. The question before the court of appeals was whether the district court had the *discretion* to grant motions presented after the previous enlargement had lapsed—not whether the district court was compelled to do so.

resulting from the government's failure to intervene or to move for additional time to intervene in a timely fashion.

2. In accordance with this Court's decision in *Pierce County*, the court of appeals also looked to other indicia of congressional intent to ascertain whether, despite the absence of any stated consequence for a failure to meet the deadlines set under Section 3730(b)(4), the statute should be construed to impose an absolute bar on untimely requests to extend the time for intervention. Pet. App. 11a-12a.[4] The court found petitioner's argument to be unsupported by the history and purpose of the False Claims Act. *Id.* at 12a-13a. Petitioner contends that the court of appeals disregarded Congress's desire, stated in the legislative history of the 1986 amendments, for prompt action by the Attorney General on *qui tam* complaints. Petitioner asserts (Pet. 21) that a "broader and more substantive reading" of the statute and the legislative history would reveal an intention to create a remedy for defendants in *qui tam* cases for delay by the government while the case is under seal. That argument is without merit.

The Senate Report accompanying the 1986 amendments stressed that extensions of the period during which the government must decide whether to intervene and take over the litigation should be weighed carefully.

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[4] The court of appeals acknowledged that this Court's recent decision in *James Daniel Good* might plausibly be read to "render[] unnecessary any resort to legislative history where Congress has not specified the consequence of dismissal for the government's failure to meet a statutory deadline." Pet. App. 11a n.5. The court ultimately concluded, however, that the opinion in *James Daniel Good* was ambiguous on this point and that examination of the legislative history (in accordance with this Court's analysis in *Pierce County*) was therefore appropriate. *Ibid.*

Senate Report at 24. Judicial control over the intervention deadlines was intended, however, as a means of ensuring that private *qui tam* plaintiffs receive a reasonably prompt decision regarding intervention by the government. See *id.* at 3-6, 24. The legislative history of the *qui tam* provisions does not suggest that the statutory time limits for intervention by the Department of Justice were intended to provide *defendants* in fraud cases with additional procedural protections. Putative False Claims Act defendants are protected from undue delay by the government in instituting suit in the usual manner in which the law affords protection against stale claims: through a statute of limitations. See 31 U.S.C. 3731(b). There is no basis for construing the period provided for intervention pursuant to 31 U.S.C. 3730(b)(4) as an additional limitations period. See *James Daniel Good*, 114 S. Ct. at 506-507. Accordingly, review of the third question presented in the petition is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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